Supreme Court, U.S.
SEP

No. 01-300

In The

Supreme Court of the United States

PETRA MENOR,

Petitioner,

vs.

FINANCE FACTORS, LIMITED,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The sole basis for the district court's Order of dismissal, as well as the Ninth Circuit Court of Appeals' decision, was the determination that "the doctrine of res judicata barred [Petitioner PETRA D. MENOR's] Truth in Lending Act claim for rescission of a real estate loan transaction with [Respondent FINANCE FACTORS, LIMITED]." (See Ninth Circuit's decision below). Accordingly, the sole issue on appeal is whether the district court and the Ninth Circuit erred in concluding that res judicata bars MENOR's claims, where MENOR failed to raise her claims or defenses in a prior state court foreclosure action that resulted in a final judgment against MENOR.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The only parties to this proceeding are Petitioner PETRA MENOR (hereinafter "Petitioner" or "MENOR") and Respondent FINANCE FACTORS, LIMITED (hereinafter "FINANCE FACTORS").

The parent corporation of Respondent FINANCE FACTORS is Finance Enterprises, Ltd. No publicly held company owns 10 percent of more of the stock of FINANCE FACTORS.

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STATUTES INVOLVED IN THE CASE

Section 667-3, Hawaii Revised Statutes, as amended:

§ 667-3. Proceeds, how applied.

Mortgage creditors shall be entitled to payment according to the priority of their liens, and not pro rata; and **judgments of foreclosure shall operate to extinguish the liens of subsequent mortgages of the same property**, without forcing prior mortgagees to their right of recovery. The surplus after payment of the mortgage foreclosed, shall be applied pro tanto to the next junior mortgage, and so on to the payment, wholly or in part, of mortgages junior to the one assessed. (Emphasis added).

28 U.S.C. § 1738:

Sec. 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall

> **have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.** (Emphasis added).

15 U.S.C. § 1640(e):

> (e) Jurisdiction of courts; limitations on actions; State attorney general enforcement
>
> Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation. * * *

CONCISE STATEMENT OF THE CASE

FINANCE FACTORS was the holder of a mortgage executed in 1995 by MENOR and two co-debtors. The mortgage secured three parcels of real property, including the alleged principal dwelling of MENOR.

In 1996, INTERNATIONAL SAVINGS AND LOAN ASSOCIATION, LIMITED (hereinafter "INTERNATIONAL SAVINGS") filed a mortgage foreclosure action, in the Circuit Court of the First Circuit, State of Hawaii, Civil No. 96-1819-05. The foreclosure action sought to foreclose on MENOR's principal dwelling. FINANCE FACTORS filed a Crossclaim in that action to foreclose on its second mortgage lien on the principal dwelling. No Counterclaims were asserted by MENOR or her co-debtors.

The State Court entered decrees of foreclosure and final judgments in favor of both FINANCE FACTORS and INTERNATIONAL SAVINGS in 1996.[1] Neither MENOR nor her co-debtors filed an appeal. Following a series of delays caused by seven (7) serial bankruptcy filings by MENOR and/or her co-debtors, the principal dwelling was sold and the sale confirmed in 1998. Because FINANCE FACTORS held the second mortgage, FINANCE FACTORS did not recover any of the sale proceeds from the foreclosure of the principal dwelling. As a matter of state law, INTERNATIONAL SAVINGS' decree of foreclosure extinguished subsequent liens on the property, including FINANCE FACTORS' second mortgage lien. Section 667-3, Hawaii Revised Statutes ("HRS") (as amended).[2]

MENOR filed her TILA lawsuit in the United States District Court for the District of Hawaii.[3] MENOR alleged

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[1] Under Hawaii law, a decree of foreclosure is final and appealable. *Security Pacific Mortgage Corp. v. Miller*, 71 Haw. App. 65, 69, 783 P.2d 855 (1989).

[2] HRS § 667-3 provides that judgments of foreclosure shall operate to extinguish the liens of subsequent mortgages of the same property.

[3] MENOR's Statement of the Case contains a misstatement of fact. She states that she sent a notice of cancellation on July 31, 1998, demanding rescission, which Finance Factors *immediately refused*, and that she *thereafter* filed her TILA complaint on August 3, 1998 (just 3 days after sending her purported notice of cancellation). In fact, Finance Factors responded to her purported notice of cancellation by letter dated August 10, 1998, *after* the TILA complaint was filed, advising her that the purported cancellation was invalid. In other words, MENOR filed her TILA complaint *before* she had received a response to her purported cancellation.

that she had a right to rescind her mortgage transaction with FINANCE FACTORS 3 years after the consummation of the mortgage transaction. Although the TILA grants a 3 day right of rescission, MENOR alleged that she was entitled to a 3 year right of rescission as she claimed that she was provided with only one copy of the TILA mandated disclosures and notice of right to cancel, rather than two copies.

Upon service of the Complaint, FINANCE FACTORS, the only defendant in the case, filed a Motion to Dismiss or, In the Alternative, for Summary Judgment (hereinafter the "Motion to Dismiss"). The Motion to Dismiss raised several alternative bases for dismissal, both procedural and substantive. The procedural bases for dismissal included res judicata (as the State Court had previously entered a decree of foreclosure and final judgment), mootness (as the principal residence had been sold and FINANCE FACTORS' second mortgage extinguished), and improper collateral attack (as MENOR was seeking to avoid or circumvent the decree of foreclosure and the rulings in the foreclosure proceeding by indirectly or collaterally attacking the foreclosure proceeding through a new lawsuit).

The substantive bases for dismissal included the lack of timeliness of MENOR's claim for rescission (the TILA grants a 3 day right of rescission; MENOR rescinded after 3 years), and the lack of merit of her claims (including her claims that she did not read nor understand the TILA disclosures, and that she received only one copy of the disclosures).

After notice and a hearing, the district court granted the Motion to Dismiss, entering summary judgment in favor of FINANCE FACTORS, solely on the basis of res judicata. The district court's Order of dismissal did not address the other claims and issues raised by either FINANCE FACTORS or MENOR.

MENOR filed a Notice of Appeal to the Ninth Circuit Court of Appeals. Prior to oral argument, FINANCE FACTORS filed a Motion to Dismiss Appeal With Prejudice on the Basis of Mootness, as MENOR's principal dwelling had been foreclosed and sold prior to the hearing on the Motion to Dismiss in the district court, no appeal of the foreclosure action was ever filed, FINANCE FACTORS did not recover any of the foreclosure sale proceeds, and FINANCE FACTORS' second mortgage had been extinguished by the foreclosure action. The Ninth Circuit did not rule on the Motion, stating that it would "decide the issue of mootness after oral argument." (See Order filed February 6, 2001). The Ninth Circuit never ruled on the mootness issue, as it affirmed the district court's ruling solely on the basis of res judicata.

The Ninth Circuit issued a short Memorandum Decision, affirming the district court's decision that res judicata barred MENOR's TILA claims for rescission, for the reasons set forth in the Ninth Circuit's opinion in *Albano v. Norwest Financial Hawaii, Inc.*, Case No. 99-16109 (9th Cir. 2001), which was filed on March 30, 2001, and which is included in the Appendix to MENOR's Petition.

The Ninth Circuit thereafter denied MENOR's Petition for Rehearing and for Rehearing en banc, as the

panel that heard oral argument unanimously voted to deny the petition for rehearing, and none of the Ninth Circuit judges requested a vote for en banc consideration. (See Order Denying Petition for Rehearing and Rehearing En Banc, filed May 17, 2001).

ARGUMENT (REASONS FOR DENYING THE PETITION)

I. PETITIONER HAS NOT PRESENTED ANY COMPELLING REASON FOR THIS COURT TO GRANT A WRIT OF CERTIORARI.

Petitioner has not demonstrated any "compelling reason" for this Court to grant a Writ of Certiorari, pursuant to Rule 10 of the Rules of the Supreme Court of the United States ("Supreme Court Rules").

Instead, Petitioner simply argues that the Ninth Circuit either: (1) failed to address the issues that Petitioner wanted the Ninth Circuit to address; (2) ignored decisions of *trial courts* in the State of Hawaii; or (3) misread Hawaii appellate decisions. These are not compelling reasons for this Court to exercise its judicial discretion to grant a Writ of Certiorari.

It should be noted that the opinion below is an unpublished Memorandum Decision of a three member panel of the Ninth Circuit, with no precedential value. The panel unanimously agreed that the case was unworthy of rehearing, denying a petition for rehearing. The full Ninth Circuit agreed that the case was unworthy of rehearing, as the petition for rehearing en banc was

denied, with none of the judges even requesting a vote for en banc reconsideration.

FINANCE FACTORS will address each of the criteria identified by Supreme Court Rule 10 in determining whether this Court should grant review.

A. THE NINTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH OTHER COURTS OF APPEAL.

Petitioner does not cite any decisions of other Courts of Appeals that are in conflict with the Ninth Circuit's decision. (Supreme Court Rule 10(a)). Although the Petition very briefly cites three decisions from other Circuits, Petitioner does not demonstrate that any of these decisions are in conflict with the Ninth Circuit's decision below on the same important matter.

B. THE NINTH CIRCUIT HAS NOT DECIDED AN IMPORTANT FEDERAL QUESTION IN CONFLICT WITH THE HAWAII SUPREME COURT.

Petitioner has not demonstrated that the Ninth Circuit has decided an important *federal* question in a way that conflicts with a decision of the state court of last resort, i.e., the Supreme Court of the State of Hawaii. (Supreme Court Rule 10(a)). The Petition cites four Hawaii Supreme Court cases. Two of those cases were relied upon by the Ninth Circuit in making its decision. The Petition merely argues that the Ninth Circuit misread these decisions. The other two cases were cited in passing

by Petitioner, without an explanation of what important federal question was decided by these cases in conflict with the Ninth Circuit.

Moreover, there is no important federal question at issue in this case. The underlying substantive claims are frivolous: MENOR alleges technical, nonsensical, or implausible violations of the TILA (e.g., receiving only one copy, rather than two copies, of the TILA disclosures and notice of right to cancel; no verbal explanation of disclosures; one co-borrower did not speak or read English). The Petition is merely a continuation of a pattern of bad faith, endless delay, and meritless litigation by MENOR and her co-debtors, including the filing of seven (7) serial bankruptcy filings by MENOR and/or her co-debtors.

C. THE NINTH CIRCUIT'S DECISION HAS NOT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

Petitioner has not explained why the decision below is "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." (Supreme Court Rule 10(a)). To the contrary, the Ninth Circuit's opinion follows the well-established rule that under the full faith and credit statute, 28 U.S.C. § 1738, the federal court must give a state court judgment the same preclusive effect as would be given that judgment under the **law of the state** in which it was rendered. *Migra v. Warren City School District Board*

of Education, 465 U.S. 75, 80-81 (1984). This Court has further held that the full faith and credit statute directs the federal court to refer to the **preclusion law of the state** in which the judgment was rendered. *Marrese v. American Academy of Orthopedic Surgeons*, 470 U.S. 373, 380 (1985).

Under Hawaii law, res judicata precludes relitigation of any claim or defense that *might have been* properly litigated, not just claims that were actually litigated or that should have been litigated. *Silver v. Queen's Hospital*, 63 Haw. 430, 435-36, 629 P.2d 1116 (1981); *see also, State by Price v. Magoon*, 75 Haw. 164, 858 P.2d 712, 725 (1993).

D. THE NINTH CIRCUIT HAS NOT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT NEEDS TO BE SETTLED BY THIS COURT.

Petitioner does not allege that the Ninth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court. (Supreme Court Rule 10(c)). As set forth above, this Court long ago settled the question of the preclusive effect to be given to a prior state court judgment. As also set forth above, this case does not present any important questions of federal law.

E. THE NINTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT.

Petitioner has not shown that the Ninth Circuit's decision conflicts with any decision of this Court. (Supreme Court Rule 10(c)). Petitioner cites two decisions from this Court, *Grogan v. Garner*, 498 U.S. 279 (1991), and *Beach v. Ocwen Federal Bank*, 523 U.S. 410 (1998).

With regard to the first case, Petitioner concedes that "[t]he actual decision in *Grogan* . . . is not directly relevant here." (See Petition at 16). Petitioner does not argue that the Ninth Circuit's ruling is in conflict with *Grogan*, a bankruptcy case that had nothing to do with res judicata or TILA.

With regard to the second case, Petitioner does not argue that the Ninth Circuit's decision is in conflict with *Beach*; instead, Petitioner stretches the limited holding of *Beach* in a convoluted effort to establish that *Beach* "provides a consistent rationale for resolving existing conflicting TILA res judicata decisions." (See Petition at 17). *Beach* held that a borrower cannot assert a TILA claim of rescission as an affirmative defense in a collection action brought by the lender after the extended 3 year period for rescission had run. This is a non-issue in this case. FINANCE FACTORS has never alleged that MENOR's claim for rescission was asserted after the extended 3 year period had run.

Beach did not discuss res judicata. *Beach* did not discuss permissive versus compulsory counterclaims. Yet, somehow, MENOR argues that, based upon *Beach*, res judicata may not bar a subsequent federal court TILA

rescission action. (See Petition at 17-21). MENOR's strained interpretation of *Beach* should be rejected by this Court.

II. THE PETITION SHOULD BE DENIED ON THE BASIS OF MOOTNESS, AS THE PRINCIPAL DWELLING HAS BEEN SOLD AND DEFENDANT FINANCE FACTORS' SECOND MORTGAGE HAS BEEN EXTINGUISHED.

The Petition should also be denied on the basis that this case is moot. The underlying lawsuit is an action brought under the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601, et seq. Petitioner sought to rescind or cancel her mortgage transaction with FINANCE FACTORS, about three years after the mortgage was executed. However, the subject principal dwelling has been foreclosed and sold to a third party, and FINANCE FACTORS' second mortgage was extinguished as a matter of law. Accordingly, this action is moot, as effective relief cannot be granted to Petitioner, and Petitioner's alleged injury is not likely to be redressed by a favorable decision.

A case is considered moot when events occur which prevent the court from granting effective relief. *In re Combined Metals Reduction Co.*, 557 F.2d 179, 187 (9th Cir. 1977) (citing *Mills v. Green*, 159 U.S. 651, 653 (1895)). An action is also considered moot where it is not "likely to be redressed by a favorable decision." *Nome Eskimo Community v. Babbitt*, 67 F.3d 813, 815 (9th Cir. 1995) (citations omitted). *See also, City Bank v. Saje Ventures II*, 7 Haw. App. 130, 748 P.2d 812 (1988) (dismissing an appeal as

moot on the basis that the right of a good faith purchaser to acquire property at a judicial sale cannot be affected by reversal of an order ratifying the sale where a supersedeas bond was not filed).

In this case, MENOR's residence was foreclosed and sold in 1998. No appeal or supersedeas bond was ever filed. FINANCE FACTORS, as the second mortgagee, did not recover any sale proceeds from the foreclosure of the residence. As a matter of state law, the decree of foreclosure in favor of the first mortgagee extinguished subsequent liens on the property, including FINANCE FACTORS' second mortgage lien. Section 667-3, Hawaii Revised Statutes (as amended).[4]

In light of the foregoing, effective relief cannot be granted as MENOR is attempting to rescind a mortgage that has already been extinguished by the first mortgagee's foreclosure and sale of the principal dwelling. The case is therefore moot. Any potential damage claims by MENOR under the TILA are barred by the one-year statute of limitations set forth in 15 U.S.C. § 1640(e), as the mortgage was executed in August, 1995, and the TILA lawsuit filed in August, 1998.

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[4] Section 667-3, Hawaii Revised Statutes, provides that judgments of foreclosure shall operate to extinguish the liens of subsequent mortgages of the same property.

III. THE DISTRICT COURT DID NOT ERR IN DISMISSING MENOR'S CLAIMS BASED UPON RES JUDICATA.

The sole basis for both the Ninth Circuit's opinion and the district court's Order of dismissal was the conclusion that res judicata bars MENOR's claims. Accordingly, the **sole issue** is whether the district court and the Ninth Circuit erred in concluding that res judicata bars MENOR's claims.

It is well established that under the full faith and credit statute, 28 U.S.C. § 1738, the federal court must give a state court judgment the same preclusive effect as would be given that judgment under the **law of the state** in which it was rendered. *Migra*, 465 U.S. at 80-81. This Court has further held that the full faith and credit statute directs the federal court to refer to the **preclusion law of the state** in which the judgment was rendered. *Marrese*, 470 U.S. at 380. Despite the fact that the Ninth Circuit's opinion clearly indicated that this was the sole basis of its decision, MENOR does not address this fundamental principle of res judicata analysis. Under Hawaii law, res judicata requires that: (1) the claim asserted in the present action was or could have been asserted in the prior action; (2) the parties in the present action are identical to, or in privity with, the parties in the prior action; and, (3) a final judgment on the merits was rendered in the prior action. *Pedrina v. Chun*, 97 F.3d 1296, 1301 (9th Cir. 1996).

To determine the first element of the res judicata test, whether the claim asserted in the present action was or could have been asserted in the prior action, Hawaii law

requires that the district court determine whether Plaintiff's TILA claim arose out of the same transaction upon which the state court's foreclosure action was based. *Kauhane v. Acutron Co., Inc.*, 71 Haw. 458, 463, 295 P.2d 276 (1990). Under the Hawaii Supreme Court's decision in *Pacific Concrete Federal Credit Union v. Kauanoe*, 62 Haw. 334, 341, 614 P.2d 936 (1980), the debtor's TILA action arises out of the same transaction as the creditor's collection action. Most importantly, under Hawaii law, res judicata precludes relitigation, not only of claims actually litigated, but also of all grounds of claim and defense that *might have been* properly litigated. *Silver*, 63 Haw. at 435-36. The second and third elements have never been disputed, as the parties are identical, and a decree of foreclosure is final and appealable under Hawaii law. *Security Pacific*, 71 Haw. App. at 69.

The district court's finding that the State Court's foreclosure action precluded MENOR's claims on the basis of res judicata is consistent with the Hawaii Supreme Court's holding in *Ellis v. Crockett*, 51 Haw. 45, 57 (1969). In *Ellis*, a mortgagor's action to rescind a note and mortgage was barred by a prior court order granting foreclosure of the note and mortgage. The court found that "the [l]ower court granted the foreclosure in the prior suit, thereby deciding all issues relating to the validity of the mortgage instrument[.]" *Id.* The Hawaii Supreme Court has further held that under the res judicata doctrine, the finally adjudicated decree of foreclosure, together with the subsequent commissioner's deed, conclusively adjudicates and extinguishes the claims of the mortgagors. *Harada v. Ellis*, 4 Haw. App. 439, 667 P.2d 834, 838 (1983).

Despite MENOR's attempts to confuse or obscure the issues, the analysis is simple. Res judicata is determined by the law of the state court. Under Hawaii state law, the debtor's TILA claim and the creditor's collection claim arise from the same transaction. Res judicata, under Hawaii law, precludes relitigation of any grounds of any claim or defense that might have been properly litigated.

CONCLUSION

In light of the foregoing, Respondent FINANCE FACTORS, LIMITED respectfully submits that there is no compelling reason for this Court to grant a Writ of Certiorari, that the case is moot, that the district court below did not err in dismissing MENOR's lawsuit on the basis of res judicata, and that the Ninth Circuit did not err in affirming the district court's order of dismissal. Respondent FINANCE FACTORS, LIMITED accordingly requests that this Court deny the Petition for Writ of Certiorari.

Dated: Honolulu, Hawaii, September 19, 2001.

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